No. 208.

IN THE SUPREME COURT

OF THE

UNITED STATES

EDWARD JASTER, &c.,
Plaintiff in Error.

vs.

F. M. CURRIE,
Defendant in Error.

ERROR TO THE SUPREME COURT OF NEBRASKA.

BRIEF OF DEFENDANT IN ERROR.

HALLECK F. ROSE and
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EDWARD JASTER, Sr.,
Plaintiff in Error.

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Defendant in Error.

OCTOBER TERM, 1903.
NO. 613

ERROR TO THE SUPREME COURT OF NEBRASKA

BRIEF OF DEFENDANT IN ERROR.

STATEMENT.

This action was brought by plaintiff in error in the District Court of Custer County, Nebraska, on a judgment rendered against the defendant in error by the court of common pleas of Trumbull County, Ohio. The plaintiff filed a general demurrer to the defendant's answer which was overruled. Plaintiff refused to plead further, a judgment was rendered for defendant, and the action was taken to the Supreme Court of Nebraska, by petition in error, where the judgment of the lower court was affirmed. The opinion of said court is reported in 94 N. W. 995.

Briefly stated, the following facts were pleaded in defendant's answer and admitted by plaintiff's general demurrer thereto:

1. That on the 6th day of September, 1899, the date of the

commencement of the Ohio case, the plaintiff was, and, for more than eight years prior to said date, had been, and now is, a bona fide resident of Custer County, Nebraska.

2. That on the 28th day of December, 1898, the plaintiff commenced an action in the district court of Custer county, Nebraska, against the defendant upon the identical notes set up in said Ohio action.

3. That on August 3, 1899, plaintiff caused to be served upon defendant's attorney, in Custer county, Nebraska, a notice in which it was stated that plaintiff would take the deposition of a certain witness at Vernon, in Trumbull county, Ohio, on the 5th day of September, 1899, between the hours of ten o'clock A. M. and six o'clock P. M., to be used in the trial of said Custer county case.

4. That defendant, in pursuance of said notice, and for the express and only purpose of attending the taking of said deposition, went to the state of Ohio on the 4th day of September, 1899, and was in attendance at the time and place mentioned in said notice for taking said deposition.

5. That on the evening of the day set for taking said deposition defendant was taken sick, and on the next day, to-wit, September 6th, plaintiff commenced said action in Trumbull county, Ohio, and caused summons to be served on defendant at 8 o'clock A. M. on the morning of the 7th of September, before defendant could have left said county by the best and most expeditious way of returning to his home in Nebraska.

6. That plaintiff caused said notice to take deposition to be served fraudulently and wilfully, and for the fraudulent purpose of enticing and inducing the defendant to go to the state of Ohio that plaintiff might obtain service upon him in said state.

7. That said notice to take deposition was simply a ruse,

and was given for the purpose of misleading, inducing and enticing the defendant to go to Trumbull county, Ohio, and for the fraudulent purpose of attempting to get service on defendant in said action, and for no other purpose.

8. That defendant believed that said notice to take deposition was given in good faith by plaintiff, and did not discover, nor know, that same was given for the purpose of enticing and inducing him to come to the state of Ohio, that service of summons might be made on him there, until long afterwards.

9. That by reason of defendant's not discovering plaintiff's fraud in inducing and enticing him to come to Ohio, the defendant had no opportunity of presenting same to the Ohio court.

10. That defendant now has, and has always had, a valid defense to the notes sued upon in the Ohio action.

11. That prior to the year 1889, plaintiff had loaned and invested certain moneys in Custer county, Nebraska, and during that year came to Nebraska and entered into an agreement with the defendant, by the terms of which the defendant was to take charge of said investments, collect outstanding notes, and reinvest said funds by loaning same, or by turning over to plaintiff good notes given to defendant, instead of reloaning the money; that, by the terms and conditions of said original contract, it was agreed that, in all cases, when the defendant should turn over, indorse and deliver notes to plaintiff, which defendant had taken in his own name, that defendant should not be personally liable to the plaintiff on his said indorsements, or any of them.

12. That the notes sued upon in the Ohio action were all good notes, well secured by chattel mortgages, given by solvent parties, and were each and all indorsed, turned over

and delivered to plaintiff, under and by virtue of the terms of said agreement, that defendant should not be liable personally on said indorsements.

Whether the agreement that the defendant should not be personally liable to plaintiff on the indorsement of notes taken in defendant's name and turned over to plaintiff, pleaded in the answer, was in writing or verbal is not shown. But as plaintiff failed to move that the answer be made more definite in this respect, the court should, if necessary to sustain the judgment, presume that said contract was in writing. Said agreement was supported by a valid consideration, to-wit, that the defendant should invest plaintiff's funds and transfer notes to him for the purpose of such investment.

ARGUMENT AND CITATION OF AUTHORITIES.

Several questions of general jurisprudence were passed upon by the state court in this case which are in no sense federal questions. In his application to the Chief Justice of the Nebraska supreme court for a writ of error herein, plaintiff alleges but a single reason for the removal of the case to this court, to-wit, that full faith and credit was not given by the courts of Nebraska to the Ohio judgment which constitutes plaintiff's cause of action, as provided in Section 1, Article 4, of the constitution of the United States. In plaintiff's "Assignments of Error," filed in this case, the same question is raised, though variously stated in the several paragraphs thereof. But in their brief filed herein, counsel for plaintiff have discussed, and seek to have this court review, not only the federal question referred to in said application, but also all other questions passed upon by the state supreme court.

On page 3 of their brief, counsel, after quoting from the opinion of the state court, say:

"Our contention then was and still is:

First: So long as that judgment stood unimpeached in Ohio, it was unimpeachable in Nebraska.

Second: The answer disclosed no fraud on the part of the plaintiff.

Third: The answer disclosed no valid defense against either the notes or the judgment."

It is obvious that the second and third propositions above quoted are both questions of general jurisprudence and their determination involves no federal question. But if these questions were open to review here, we are confident that this court would arrive at the same conclusions reached by the state court in regard thereto.

On the question of fraud, plaintiff, by his demurrer, admits that his only purpose in serving notice to take depositions, in the case then pending in Nebraska, was to induce and entice the defendant to come within the jurisdiction of the Ohio court in order that plaintiff might obtain service on him there; that defendant did not know of such fraudulent purpose but believed that the same was bona fide and was thereby induced and enticed into Ohio and service thereby obtained upon him. It requires no argument to show that such purpose and conduct of plaintiff constitute fraud, not only upon the defendant but upon the jurisdiction of the Ohio court. This was the specific holding of the supreme court of Arkansas in Peel vs. January, 35 Ark. 331.

Plaintiff's said third proposition is based upon the contention that the contract implied from the blank indorsement of negotiable paper cannot be contradicted or varied by parol evidence, even between the original parties; and that there was no consideration for the agreement that de-

fendant should not be personally liable on said indorsements. The decision of the state court that the contract, which the law implies from the blank indorsement of a promissory note, may be contradicted, so long as the rights of innocent third parties are not involved, was made on the well-settled, pre-existent rules of general jurisprudence established by a long line of decisions in Nebraska as is shown by the cases cited in said opinion and is, therefore, not subject to review by this court. Bank of Western Tennessee vs. Citizens Bank of Louisiana, 14 Wall. 9. Besides, the record in this case does not show that said contract was not in writing and of equal solemnity with the written indorsements. Plaintiff's contention that there was no consideration to support his agreement that defendant should not be liable on his indorsements is wholly without merit, as such agreement is supported by the same consideration as the balance of the contract, to-wit, the investment of the funds of plaintiff.

But the discussion of these questions is simply academic, for, under well-settled principles and rules, said questions cannot be considered by this court in this case.

I.

A WRIT OF ERROR TO THE HIGHEST COURT OF A STATE BRINGS BEFORE THE SUPREME COURT OF THE UNITED STATES ONLY THE FEDERAL QUESTIONS INVOLVED.

Watson vs. Mercer, 8 Peters, 88.
Barbier vs. Connolly, 113 U. S. 27.
Eustis vs. Bolles, 150 U. S. 361.
Ashley vs. Ryan, 153 U. S. 440.
Jacobs vs. Marks, 182 U. S. 590.

The case of Jacobs vs. Marks, supra, was brought to this court by writ of error to the supreme court of Illinois. Several questions of law were raised, among which was the question of whether the state court had given full faith and credit to a judgment of the state of Michigan. This court held that this was a federal question and the action of the state court in regard to said judgment was reviewed and found correct, but the court declined to consider the non-federal questions involved in the case. We quote from said opinion:

"It is, of course, obvious that none of the errors assigned to the rulings of the trial court, in the admission or rejection of evidence, or its instructions to the jury, nor those assigned to the judgments of the Appellate and Supreme Courts, can be considered by us except as they affect the question of the legal import of the Michigan judgment, as concluding the controversy between the parties in the Illinois courts."

After reviewing the federal question and holding that it had been properly decided by the supreme court, this court said:

"These views dispose of the only question which our jurisdiction enables us to review.

"Finding, as we do, that the courts of Illinois gave all that faith and credit to the judgment and judicial proceedings in the Michigan court to which they were entitled under the Constitution of the United States, the other errors assigned we cannot consider, and the judgment of the Supreme Court of Illinois is affirmed."

It is therefore clear that the only question to be reviewed or considered by this court in this case is "did the state court, by permitting the defendant to plead fraud as a defense to plaintiff's action on the Ohio judgment, fail to give

full faith and credit to said judgment?"

The questions as to whether the facts pleaded constitute fraud and as to the right to contradict the contract implied from a blank indorsement of a note, and as to the consideration of the agreement pleaded, are in no sense federal questions. They were, therefore, conclusively settled by the state supreme court and cannot be reviewed here.

Counsel state their contention in relation to the only federal question raised, to-wit, the right to plead fraud as a defense to the Ohio judgment as follows:

"So long as that judgment stood unimpeached in Ohio, it was unimpeachable in Nebraska."

We take issue with counsel on this proposition and insist that the test is not "has the judgment been impeached for fraud in Ohio?" but rather, "would the courts of Ohio permit it to be impeached for fraud in an action brought therein to enforce it?"

A correct statement of the law in regard to the question under consideration is as follows:

II.

SECTION 1, ARTICLE 4, OF THE FEDERAL CONSTITUTION REQUIRES NOTHING MORE THAN THAT THE JUDGMENT OF A SISTER STATE BE GIVEN THE SAME EFFECT THAT IT HAS IN THE STATE WHERE IT WAS PRONOUNCED; AND WHATEVER PLEAS WOULD BE GOOD IN A SUIT THEREON IN SUCH STATE CAN BE PLEADED IN ANY OTHER COURTS IN THE UNITED STATES.

Act of May 26, 1790, vol. 1, p. 115.
Mills vs. Duryee, 7 Cranch., 481.

Hampton vs. McConnell, 3 Wheaton, 235.

In Hampton vs. McConnell, supra, Marshall, C. J., referring to Mills vs. Duryee, and speaking for the court, said:

"The doctrine there held was that the judgment of a state court should have the same credit, validity, and effect, in every other court in the United States, which it had in the state where it was pronounced; and that whatever pleas would be good to a suit thereon in such state, and none others, could be pleaded in any other court in the United States."

And this has been the settled rule of this court ever since.

This leads us to inquire whether the plea of fraud in obtaining the Ohio judgment in question would have been permitted if the action to enforce said judgment had been brought in the courts of that state. Counsel contend that it could not and cite Anderson vs. Anderson, 8 Ohio, 109, as sustaining their contention. The judgment sued upon in the Anderson case was obtained in Virginia and the decision therein is not, therefore, authority upon whether a plea of fraud would be allowed in an action in the Ohio courts upon a domestic judgment. Besides, said case was decided in 1837, before the adoption of the Ohio Code, materially changing the organization and jurisdiction of courts and method of procedure, and it has ceased to be an authority in Ohio even upon the question therein decided, as we shall hereafter show.

Before the adoption of the Ohio Code, a party against whom a judgment had been obtained by fraud had the right to maintain an original action in equity to set aside such fraudulent judgment. Lockwood vs. Mitchell, 19 Ohio, 448.

The Ohio Code of Civil Procedure enacted in 1853, abolished the distinction between actions at law and suits in

equity. We quote therefrom:

"The distinction between actions at law and suits in equity, and the forms of all such actions and suits, heretofore existing, are abolished; and in their place, there will be, hereafter, but one form of action, which shall be called a civil action. 2 S. & C. Stat. 941."

This section is identically the same as section 3 of the Nebraska Code.

The case of Conway vs. Duncan, 28 O. S. 102, is quite in point on the question under consideration. In that case certain heirs obtained judgments against the estate of their ancestor. Duncan, the administrator, thereafter commenced an action in the court of common pleas alleging the recovery of the judgments; that there was no personal property with which to pay the same; and praying for an order to sell land of said estate to satisfy said judgments. All heirs were made parties, and those who had not obtained said judgments filed an answer and cross-bill alleging fraud in obtaining the same as a defense thereto. This, the trial court held, could not be done. But the supreme court held otherwise and reversed and remanded the case. We quote from the court's opinion, pages 105 and 106:

"If it be true that these judgments, so entered upon the awards of the arbitrators, can not be impeached for fraud, and if they are conclusive evidence of the indebtedness of the estate, then the district court was right, and its judgment must be affirmed.

"That a judgment can be impeached for fraud, we suppose to be a settled question. Lockwood v. Mitchell, 19 Ohio, 448. As is said in Swihart v. Shaum, 24 Ohio St. 432, the conclusiveness of the judgment depends upon the absence of fraud or collusion; and it is competent for the party injured to resort to a court of chancery for relief against such fraud or collusion. These parties, therefore, Walter and Catherine

Conway, might have filed an original bill in chancery, and, by injunction, restrained the administrator from proceeding to sell the land, on the ground that the alleged debts and judgments upon them were fraudulent, and were obtained without the fault or negligence of the parties complainant. What would be good ground for such a bill in equity is good ground for a civil action under the code. Long v. Mulford, 17 Ohio St. 484; Coates v. Chillicothe Bank, 23 Ohio St. 415.

"In Bank of Wooster v. Stevens it is held that a judgment may be set aside upon cross-bill in a proceeding to enforce it.

"We suppose, therefore, that in an action under the code to enforce a judgment, a cross-petition may be filed, and the judgment attacked for fraud, in the same way that it might be by an original proceeding for that purpose.

"The conclusiveness of judgments in general applies to those who are parties and privies to it, and it is claimed that the Conways were neither, so far as regards the proceedings before the arbitrators and the judgments thereon. Whether they were or not, those judgments can be impeached for fraud, under proper circumstances, in the one case as well as the other.

"There may perhaps be the difference that if the party was cognizant of the fraud, and failed to set it up in trial, he may be precluded from so doing after judgment, while one not a party or privy could have had no opportunity of making such defense."

Kingsborough vs. Towsley, 56 O. S. 540; 47 N. E. 544, was an action brought in the court of common pleas of Cuyahoga county, Ohio, on a judgment obtained before a justice of the peace of said county. The transcript of said judgment showed that summons was served on defendant by leaving a copy at his usual place of residence. The defendant sought to impeach this judgment by pleading in his answer that the place where the summons was left was not the residence of defendant. No defense to the original cause of action was

pleaded in said answer. Plaintiff contended that the judgment could not be impeached in said action; that the Code provides a method of direct attack upon judgments by proceedings thereunder to have them vacated or modified, of which the defendant should have availed himself, and by which he is required to tender a good defense to the action before a vacation of the judgment could be obtained. The lower court sustained this contention and rendered a judgment for the plaintiff, but the supreme court held that the defense was a proper one and that it was not necessary to plead or tender a defense to the original action. After referring to the statutory provisions for an attack upon judgments, the court said:

"The equitable remedy was not taken away by those statutory provisions, authorizing an application to the court in which the judgment was rendered to vacate or modify the judgment; nor was it abrogated by any provision of the Code. And as the ultimate legal and equitable rights of the parties concerning the subject-matter in litigation may now be finally determined in the civil action of the Code, which has taken the place of both the former action at law and suit in equity, there is no reason why, in an action on a judgment, the defendant may not plead, by way of defense, any matter which would have been available as a ground of relief in equity against the judgment. The Code authorizes a defendant to plead the equitable, as well as the legal, defenses he may have to an action; and whatever is sufficient in equity to defeat a judgment or its enforcement is a valid equitable defense to an action brought upon it."

In Greene vs. Woodland Ave., etc., Co., 62 O. S. 67; 56 N. E. 646, the court thus states the law:

"When the validity of a judgment is attacked, and an effort made to have it set aside and vacated, or the lien thereof removed, it is proper to compel the plaintiff to show, not only

that the judgment is invalid, but that there is a good defense to the action in which the judgment was obtained; but, when the holder of the judgment attempts to enforce it in a legal proceeding in which he can succeed only by showing a valid judgment, the invalidity of the judgment may be shown as a defense, without going further, and assuming the additional burden of showing that there is a good defense to the action."

The doctrine announced in the foregoing cases is now applied by the courts of Ohio to an action brought in that state on the judgment of a sister state when it is alleged that jurisdiction over defendant was obtained through fraud, as is shown by the recent case of Pilcher vs. Graham, 18 Ohio C. R. 5. This was an action at law brought in the court of common pleas of Stark county, Ohio, on a judgment of the circuit court of Cook county, Illinois. Defendant pleaded that he was a resident of Ohio and was induced to go to Cook county, Illinois, by a letter from plaintiff, stating that his presence was necessary to close up some business, which plaintiff and defendant were jointly interested in, and that while defendant was in Cook county for that purpose service was made on him. The first and third subdivisions of the syllabus of said case are as follows:

"Enticing party into foreign jurisdiction to obtain service of process—

"(1) When a defendant residing in one state is induced to come within the jurisdiction of a court of another state, by a trick or false statement of the plaintiff for the purpose of serving him with summons in an action in that court, the service is void, and the court will not thereby obtain jurisdiction over the person of such defendant.

"Same—Attacking judgment obtained in foreign court for service of process fraudulently obtained—

"(3) In an action on a personal judgment rendered by a court in another state, it is competent to plead and prove in

defense that the defendant was decoyed into the jurisdiction of the court by fraud and false representation by the plaintiff, who took advantage of his presence to serve him with process; and such a defense is not within the rule which forbids the collateral impeachment of judgments, but is in the nature of a direct attack upon the judgment."

From the foregoing cases it is obvious that if the plaintiff in the case at bar had brought his action on the Ohio judgment in question in a court of that state it would have been competent and proper for defendant to plead fraud in obtaining the same as a defense to said action. It follows that the Nebraska court, in permitting such defense, gave to said judgment the same credit and effect that it has in the state where it was pronounced.

III.

IN CODE STATES, WHERE LAW AND EQUITY ARE ADMINISTERED BY THE SAME TRIBUNALS, AND THE DISPOSITION OF THE ENTIRE CONTROVERSY BETWEEN PARTIES IN ONE ACTION IS INTENDED TO BE ENCOURAGED, SUCH FRAUD AS WOULD ENTITLE THE PARTY TO RELIEF FROM A JUDGMENT UPON APPLICATION TO CHANCERY CONSTITUTES A GOOD DEFENSE TO AN ACTION ON SUCH JUDGMENT.

1 E. of P. & P., 837.
2 Freeman on Judgments, 435.
Dobson vs. Pierce, 12 N. Y. 156.
Mandeville vs. Reynolds, 68 N. Y. 544.
White vs. Reid, 24 N. Y. Sup. 290.
Eaton vs. Hasty, 6 Neb. 419.
Keeler vs. Elston, 22 Neb. 310.
Snyder vs. Critchfield, 44 Neb. 69.

Fletcher vs. Rapp, 1 S. & M. Ch. (Miss.) 374.
Holt vs. Alloway, 2 Blackf. (Ind.) 108.
Duringer vs. Moschino, 93 Ind. 495.
Davis vs. Smith, 5 Ga. 274.
Wood vs. Wood, 78 Ky., 628.
Dunlap vs. Cody, 31 Ia., 260.
Pilcher vs. Graham, 18 Ohio, C. R., 5.
Ward vs. Quinlan, 57 Mo., 425.
Gray vs. Richmond & Co., 167 N. Y., 348.
Bank vs. Anderson, (Wyo.), 48 Pac., 197.
Toof vs. Foley, 54 N. W., 59.
Abercrombie vs. Abercrombie, (Kan.), 67 Pac., 539.

The second subdivision of the syllabus in Fletcher vs. Rapp, supra, is as follows:

"Where the plaintiff in a judgment rendered in a sister state comes here to enforce it, it is entirely competent for the defendant to show that the judgment was obtained by fraud."

The third subdivision of the syllabus in Holt vs. Alloway, supra, is as follows:

"In an action on the judgment of a court in another state the defendant may plead that the judgment was obtained by fraud, or that the court had no jurisdiction of the person or of the subject matter."

The following is the syllabus in White vs. Reid, supra:

"In an action in New York on a judgment obtained in Massachusetts defendant can show that he had a valid defense which he set up in the original suit, and that the judgment was obtained by the fraud of plaintiff who induced him to abandon the further defense on assurance that he would discontinue the action."

Dunlap vs. Cody, 31 Ia., 260, was an action brought in Iowa on a judgment obtained in Illinois. Defendant, who was a carpenter and a resident of Iowa, denied any indebtedness and pleaded that he was induced to go into Illinois by plaintiff and his attorneys on the representation that an

elevator was to be built there and he could procure employment thereon; that such statements were made for the purpose of inducing him to go into Illinois so that service of summons could be made on him there in said case. The court held that such judgment was obtained by fraud and that the same was a good defense to the action at law on the judgment. The first three subdivisions of the syllabus in said case are as follows:

"1. Jurisdiction: Fraud in Obtaining: Foreign Judgment. If a person, residing in one jurisdiction, be induced, under false pretenses or representations, to come into another, for the purpose of there getting service upon him, the jurisdiction thus acquired will be held to have been fraudulently obtained.

"2. Defense: Judgment. Such fraud in obtaining jurisdiction of the person of defendant will vitiate the judgment.

"3. In a case of this kind it is not incumbent on the defendant to appear before the jurisdiction where the action was commenced and set up the facts showing the fraud; but he may, having failed to appear in the original action, plead them in a subsequent action on the judgment, commenced in the jurisdiction where he resides."

Toof vs. Foley, 87 Ia., 8, decided by the same court in 1893, was an action at law on a judgment obtained in Tennessee. The defense pleaded was that defendant, a resident of Iowa, was induced to go to Tennessee by a letter from plaintiff stating that he was ready to settle certain differences existing between him and defendant; that said letter was written for the purpose of getting defendant into Tennessee so that service might be made on him there. This was held to be a good defense. The following is a copy of the first subdivision of the syllabus in said action:

"Where a person residing in one state is induced by a party in interest, by fraud or false pretense, to come into

another, for the purpose of serving him with a summons, the jurisdiction is obtained by fraud, and the judgment is void."

In Wood vs. Wood, 78 Ky., 624, the defendant, who was a teamster and a resident of Kentucky, was induced to go into Tennessee by the representation of plaintiff that he could make a profit by hauling there; that said representation of plaintiff, although true, was made for the concealed purpose of getting service of process on defendant in Kentucky. A judgment obtained on such service was held to be fraudulent. The third subdivision of the syllabus in said case is as follows:

"Service of process upon a defendant who has been brought within the reach of the process by the fraudulent representations of the plaintiff confers upon the court no jurisdiction to render judgment, and any representation, whether true or false, is fraudulent, if made with a fraudulent design."

The case of Abercrombie vs. Abercrombie, 67 Pac., 539, decided by the supreme court of Kansas, in January, 1902, was an action at law brought on a judgment obtained in Colorado. The plaintiff and defendant were formerly husband and wife, but had parted. The husband resided in Kansas and the wife in Colorado, where she brought suit for a divorce, alimony and custody of their children. During the pendency of this action in Colorado, she, also, commenced an action in Mitchell county, Kansas, for alimony, and personal service was made on defendant. Subsequently an agreement for a compromise was entered into, by which the husband was to pay a certain amount as alimony. The attorneys for the wife told the husband they could not make any definite agreement as to the custody of the children, but that their client would not object to a decree being rendered

by the court of Colorado, giving the two boys into the custody of their father. They also stated to the husband that it was necessary for him to appear in the Colorado case and prove his fitness to take said children, which he did. Shortly after such appearance, the attorneys for the wife notified the husband's attorney that she repudiated the agreement for settlement and refused to be bound thereby, and that on a certain day they would ask that the Colorado case be set for trial. The case in Mitchell county, Kansas, was dismissed. The husband did not appear further in the Colorado case, and a decree was rendered in favor of the plaintiff for a divorce, custody of the children, and a personal judgment rendered against defendant for a large amount of alimony. An action at law was then brought on this judgment in Kansas. The defendant pleaded the foregoing facts in his answer, and the court held that the same was a good defense. We quote from the opinion in said case:

"The jurisdiction of the Colorado court over the defendant having been obtained fraudulently by the plaintiff, it would be an anomaly in the law for this court to assist her in reaping the fruits of her fraudulent conduct. It has long been a rule of this court that, where jurisdiction of a defendant has been obtained by fraud or wrong, he may appear in the action, showing such fraud, and the court will always grant relief. If this is true, can there be any well-defined distinction between permitting him to appear in the original action to show the fraud, and in allowing him to set up such fraud in an action brought upon a judgment rendered in a case where jurisdiction of the defendant was obtained by fraud? Can a valid lawful act be accomplished by an unlawful means? * * *

"The fact that the judgment sued on in this case is the judgment of a sister state can make no difference. It is only when jurisdiction is admitted that full faith and credit

should be given to the judgments of a sister state. That the judgment of a sister state may be attacked collaterally on the ground that jurisdiction was obtained fraudulently is supported by many authorities. In Wood vs. Wood, 78 Ky., 624, 627,—an action upon a judgment in another state, where jurisdiction had been obtained fraudulently,—the court said: 'The judgment, having been rendered by an inferior court, presumably without general jurisdiction, will be treated as a foreign judgment. * * * But whether it be treated as a foreign judgment, or as a judgment of a court of general jurisdiction rendered in a sister state, and therefore coming within the constitutional provision and the act of congress in regard to the faith and credit to be given such judgments, is immaterial, as it is now held both by the state and federal courts that judgments of either character may be collaterally attacked for want of jurisdiction of the subject matter or of the person, regardless of recitals in the judgment or record. * * * The only serious question that has arisen of late years upon this matter is as to whether the judgment could be collaterally inquired into, as to the jurisdiction of the person, when it recites on its face that there was service of process or personal appearance. But now even that question is practically at rest.' In Dunlap vs. Cody, 31 Iowa, 261, 262, 7 Am. Rep., 129, the chief justice says: 'Do the means used to obtain jurisdiction of the person of defendant in the courts of Illinois amount to fraud? It would seem that this question scarcely needs discussion. Fraud consists *in suggestio falsi* or the *suppressio veri*. Both exist here. * * * An enlightened and just administration of the law, no less than sound public morals, condemns such practices, and demands that the client whose cupidity could sanction * * * such purpose should * * * be disgraced. Does the fact that the jurisdiction of the person of the defendant was obtained by fraud constitute a defense to an action upon this judgment? It is the recognized law of this state that, when jurisdiction is properly acquired, fraud in the obtaining of a foreign judgment is a good defense to an

action thereon. Rogers vs. Gwinn, 21 Iowa, 59, and cases cited. If, then, fraud may be shown to defeat a recovery upon a foreign judgment, when the jurisdiction is undisputed, why should not fraud in obtaining the jurisdiction be followed by like consequences? * * * *Ex parte Wilson*, 1 Atk., 152. Referring to these authorities, Shaw, C. J., says: "These cases, therefore, seem to establish the general principle that a valid and lawful act can not be accomplished by any unlawful means, and whenever such unlawful means are resorted to the law will interpose and afford some suitable remedy, according to the nature of the case, to restore the party injured by these unlawful means to his rights." In Duringer vs. Moschino, 93 Ind., 495, subdivision 1 of the syllabus reads: "Where, by fraud, one induces another to go to another state in order to have service of process upon him, the latter can safely ignore the proceedings, and successfully resist a suit upon any judgment thus obtained."'

"It follows, therefore, that the judgment of the court below is correct, and must be affirmed. All the justices concurring."

That the authorities above cited fully support the proposition stated in the heading of this subdivision of this brief, and are in harmony with the holding of the supreme court of Nebraska in the case at bar, can not be controverted. But counsel have attacked such proposition as unsound and insist that it is in conflict with the rule established by this court in Christmas vs. Russell, 5 Wall., 290, and approved in Maxwell vs. Stewart, 22 Wall., 77.

IV.

THE RULE IN CHRISTMAS VS. RUSSELL DISTINGUISHED.

This case was decided in 1866, and the Maxwell case in 1874, while nearly all of the opinions in the cases above cited

were written since said last named date. Keeler vs. Elston, 22 Neb., 310, was decided in 1887. Christmas vs. Russell was cited in the brief of the plaintiff in error in that case,—*as it was also in several of the other cases* above cited,—and the court was urged to adopt the rule therein laid down, but refused to do so. Counsel for plaintiff contend that the rule in the Russell case is a construction of Section 1, Article 4, of the federal constitution of the Supreme Court of the United States, which should govern the state courts. This leads us to inquire why said courts, with said rule and case before them, rejected the same and refused to be bound thereby, and laid down a different rule. Counsel seem to think that it was simply a wilful disregard by said courts of a precedent, by which they should have been bound. We can not accede to this theory, but feel sure that a careful examination of the matter will convince both court and counsel that there is a good and sufficient reason for the decision in said cases, based upon the difference in the organization and jurisdiction of the United States courts and those of states which have adopted the code system. In the former, the distinction between actions at law and suits in equity is strictly maintained and enforced. The rules of pleading and practice therein are radically different from that of the codes. In the federal courts, as in state courts similarly organized, an equitable defense is not recognized nor allowed in an action at law, but the defendant is compelled to seek redress by a separate suit in equity. On the other hand, in Ohio and Nebraska, and in many other states where the distinction between actions at law and suits in equity has been abolished and but a single form of action is recognized, the whole controversy between the parties may be settled in one suit without regard to whether the action or defense is such as

has heretofore been deemed legal or equitable.

In 1 E. of P. & P., 837, the matter is stated as follows:

"EQUITABLE DEFENSES.—The Codes having abolished the distinctions between actions at law and suits in equity, and between the forms of all such actions, as theretofore existing, an equitable defense to a civil action is now as available as a legal defense. The question now is, ought the plaintiff to recover, and anything which shows that he ought not is available to the defendant, whether it was formerly of equitable or legal cognizance. But matter constituting an equitable defense is new matter, and must be pleaded."

Freeman, in his work on judgments, vol. 2, sec. 435, says:

"Defenses may be interposed in an action upon a judgment, seeking to avoid it on the ground that the defendant did not have an opportunity to present his defense in the former action, or was not properly brought before the court so that it had any right to enter judgment against him. The admissibility of defense of this character may depend on whether, under the practice sanctioned by the code or other statute of the state in which the question arises, equitable defenses may be interposed to actions at law. * * * Where, as under the code, law and equity are administered by the same tribunals, and the disposition of the entire controversy between parties in one action is intended to be encouraged, such fraud as would entitle a party to relief from a judgment upon application to chancery constitutes a good defense to an action on such judgment; and this is true in Texas, though the judgment is based upon a just demand. Hence, if jurisdiction of the defendant is obtained by false pretensions and misrepresentations, whereby he was induced to go into the state, where process was served upon him, he may successfully defend an action on the judgment founded upon such service, though in some of the states the defense will not be received as sufficient, unless some excuse is offered for not moving, in the original action, to set aside the service of process."

That the judgment of a sister state was procured by fraud is an equitable defense and can be pleaded only in those jurisdictions where the distinction between actions at law and suits in equity has been done away with. This is clearly shown by an able opinion of the New York court of appeals in Dobson vs. Pearce, 12 N. Y., 156; 62 A. D., 154, from which we quote the following:

"Under our present judiciary system the functions of the courts of common law and of chancery are united in the same court, and the distinctions between actions at law and suits in equity, and the forms of all such actions and suits, are abolished, and the defendant may set forth by answer as many defenses as he may have, whether they be such as have been heretofore denominated legal or equitable, or both: Code, secs. 69, 150. The code also authorizes affirmative relief to be given to a defendant in an action by the judgment: Sec. 274. The intent of the legislature is very clear that all controversies respecting the subject-matter of the litigation should be determined in one action, and the provisions are adapted to give effect to that intent. Whether, therefore, fraud or imposition in the recovery of a judgment could heretofore have been alleged against it collaterally at law or not, it may now be set up as an equitable defense to defeat a recovery upon it. Under the head of equitable defenses are included all matters which would before have authorized an application to the court of chancery for relief against a legal liability, but which, at law, could not have been pleaded in bar. The facts alleged by way of defense in this action would have been good cause for relief against the judgment in a court of chancery, and under our present system are therefore proper matters of defense; and there was no necessity or propriety for a resort to a separate action to vacate the judgment. In Connecticut, although law and equity are administered by the same judges, still the distinction between these systems is observed, and justice is administered under the head of common-law and chancery juris-

diction by distinct and appropriate forms of procedure; and hence, as it was at least doubtful whether at law the fraud alleged would bar a recovery upon the judgment, a resort to the chancery powers of the court of that state was proper, if not necessary."

In Mandeville vs. Reynolds, 68 N. Y., 544, this question was again passed upon, the Dobson case cited with approval, and the rule therein announced adhered to. In its opinion the court said:

"Before the system brought in by our Code of Procedure, it was a general rule that a judgment, and any other judicial record was final and conclusive between parties and privies thereto. Even then however it was said that whenever an act was done *fraudum legis*, it could not be the basis of a suit in the courts of the country whose laws were attempted to be infringed. * * *

"But the Code of Procedure has by its enactments taken away most if not all of the reasons of the rule which forbade the impeachment of a judgment collaterally. Now in an action at law, matter which was formerly of equitable cognizance solely, may be set up and given in evidence. * * *

"The court acts upon the matters involved in the action, now in a double capacity, as a court of law and one of equity. As a court of equity it meets the question of the validity of the judgment, not as one of law but as of equity, and takes hold of the facts offered to it, not as a collateral attack upon the judgment but as a direct assault, which by the changing nature of the issues in the progress of the suit and trial, has become the main question in the case and legitimately before it for trial. It would be quite an abnegation of the conjoint power and jurisdiction of the court, to proceed in the case as long as the issues were of legal cognizance, and as soon as they became of equitable cognizance, to turn the party over to another action in perchance the same court before the same judge, to have in another trial that matter proved and decided against the validity of the judgment, which as the pow-

ers of the court are now in constant reciprocal activity, may as well be determined in one trial by the same tribunal. It is not merely that the same judges possess in equal degrees, powers at law and powers in equity. It is that the distinction between actions at law and suits in equity and the forms of such actions are abolished; and that there is in this State but one form of action for the enforcement or protection of private rights and the redress of private wrongs. Code, 669. * * * The intent of the Code is clear, that all controversies respecting the matter involved in litigation shall be determined in one action. Whether fraud or imposition, in the entry of a judicial matter of record, could, before that enactment, have been set up against it, collaterally at law or not, it may now be alleged against as an equitable defense to defeat a recovery upon it. Dobson v. Pearce, 12 N. Y. 156; 62 Am. Dec. 152. Under the head of equitable defenses are included all matters which would have before authorized an application to a court of chancery for relief against a legal liability, but which at law could not have been pleaded in bar. * * *

"I think it clear that in many cases the plaintiff may prove in the same action, in opposition to matter set up and proved by the defendant therein, that which before the Code he would have been obliged to have availed himself of by a suit in equity."

In Ward vs. Quinlan, 57 Mo., 425, supra, the supreme court of Missouri held that the rule stated in Christmas vs. Russell is not applicable in a state where equitable defenses to an action at law are permitted. We quote from the opinion in said case:

"In Christmas vs. Russell (5 Wall., 290), the court held that a plea of fraud in obtaining a judgment was bad in an action on the judgment. But that court, in the same case, held that a direct suit in chancery might be maintained to enjoin such judgment in the state where it was rendered. Our practice act allows equitable as well as legal defenses to be

set up in actions at law, and our citizens ought not to be driven to foreign courts to seek remedies against judgments procured by fraud. When sued here upon such judgments, they may set up this equitable defense as a complete bar. (See Marx vs. Fore, 51 Mo., 691)."

This is also the rule of the Ohio courts as is shown by the case of Pilcher vs. Graham heretofore cited and quoted from on page 19 of this brief.

SUMMARY.

The following propositions, we think, are fully established by reason and authority:

1. In a case on error from the supreme court of a state, this court will consider only the federal questions involved.

2. Whether the contract implied by law from the blank indorsement of a note may be contradicted, and whether fraud was sufficiently pleaded in defendant's answer, are both non-federal questions and were conclusively disposed of by the decision of the state court.

3. The only federal question in the case at bar is whether the state court gave full faith and credit to the Ohio judgment in question.

4. Section 1, Article 4, of the Constitution of the United States requires only that a judgment of a sister state be given the same faith and credit which it has where rendered and any defense which may be pleaded in an action thereon in the state where it was pronounced may be pleaded in the courts of any other state.

5. In Ohio, Nebraska, and the other states which have adopted the reform code, abolishing the distinction between actions at law and suits in equity, fraud in procuring a judgment may properly be pleaded as a defense to an action

thereon in the state where pronounced or in a sister state.

6. The rule laid down in Christmas vs. Russell applies only to actions in those jurisdictions where the distinction between actions at law and suits in equity is maintained and, therefore, has no application to the case at bar.

7. In this case the Nebraska court gave the same faith and credit to the Ohio judgment that the courts of Ohio would have done if this action had been commenced therein and, therefore, all that is required by Section 1, Article 4, of the Constitution.

8. The decision of the Nebraska supreme court in this case is right and should be affirmed.

All of which is respectfully submitted.

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